SUPREME COURT, U. S.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1425

Grover C. Hill, et ux Mary K. Hill, on behalf of themselves and all stockholders of Mooney Corp. & Mooney Aircraft, Inc.

and

Grover C. Hill, et ux Mary K. Hill, derivatively on behalf of Mooney Corp. & Mooney Aircraft, Inc.

Petitioners

v.

Hal Francis Rachal and Edward B. Hunnicutt,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Appendix E. of the Petition) is reported at 435 F. 2d 59 (5th Cir. 1970).

JURISDICTION

While Petitioners seek to invoke jurisdiction under 28 U.S.C. Section 1254(1), they make no attempt

to assign or point out any of the matters set forth in Rule 19 of this Court as reasons why their Petition should be considered.

CONCERNING THE QUESTIONS PRESENTED FOR REVIEW

Petitioners state that the questions for review are whether the due process clause of the Fifth Amendment of the United Stat.. Constitution requires mutuality of estoppel prior to application of the doctrine of collateral estoppel, and whether there is a right to trial by jury in suits arising under the Securities Act of 1933 and the Securities Exchange Act of 1934. [1] Another question presented concerns the requirement, that before granting judgment in a summary judgment proceeding, the trial court must find that there is "no genuine issue as to any material fact."

The Court below held that while the requirement of mutuality of estoppel need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom it is asserted had a full opportunity to litigate the issue in the applicable prior proceeding, and that the application of the doctrine will not result in an injustice to such party under the circumstances of a particular case. In this instance, the proceeding from which Respondents have had placed upon them the onus of collateral estoppel was an injunction proceeding

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1. **Seemingly, this question contesting the right of trial by jury arises in an unusual manner since it was the Petitioners themselves who made the original demand for a jury trial of these issues they now contend are not proper for jury consideration. (Appendix in Court below, page 12)**

in which they had asked for, but had been denied, a jury trial.

STATEMENT OF THE CASE

Petitioner's Complaint filed in the trial court seeks damages for themselves, derivatively for the corporations involved, and as a class action on behalf of the corporate stockholders. As grounds for relief, Petitioners allege violations of Section 10(b) of the Securities Exchange Act of 1934, 15 USC Section 78j(b), Rule 10b-5, 17CFR 240.10b-5 promulgated thereunder and Section 5 of the Securities Act of 1933, 15 USC Section 77e. Petitioners seek their remedy at law in the form of damages for alleged fraudulent actions and alleged manipulative schemes to defraud which they say resulted in an inducement to purchase stock having a zero value, rather than the price paid. Derivatively, on behalf of the corporations, they say that Respondents engaged in a price manipulation and a violation of the corporatins' By-Laws. Petitioners seek no other relief than for legal damages as a result of the claimed wrongdoings they have alleged.

An earlier injunction suit by the Securities and Exchange Commission charged Respondents with violation of the same sections of the Securities Act of 1933 and the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Following these allegations, a trial before the court without intervention of a jury resulted in a judgment enjoining Respondents. In that purely equitable suit for injunction by the Securities and Exchange Commis-

sion, no findings of fact or conclusions of law were filed by the trial court. In this present suit, the same trial court which presided over the previous injunctive proceeding utilized that previous proceeding to declare a collateral estoppel in this case - - - saying in its findings of fact and conclusions of law in the current case that the issues of the prior injunctive proceeding were identical to the current one and that no new evidence or defense was presented by Respondents, though they were given an opportunity to do so. These findings were made, though no record of findings of fact and conclusions of law were filed by the court in the previous injunctive proceedings and the record in the Securities and Exchange Commission injunction suit was not filed or otherwise made a part of these current proceedings.

In the trial court affidavits were filed on behalf of Respondents in which issue was joined on the contentions presented by Petitioners and thereby issues of disagreement and dispute were raised concerning material issues of fact in this case. (Appendix in the Court below, page 54).

ARGUMENT AND AUTHORITIES
MUTUALITY OF ESTOPPEL

Petitioners seek to take advantage of a non-jury equitable suit for injunctive relief by the Securities and Exchange Commission, and to which they were complete strangers, in order to fully prove their purely legal action for damages - - - this in spite of disputed issues of fact and a timely demand for a trial by jury. This is not a case where employment

of the doctrine of collateral estoppel is sought against a Petitioner who has asserted and lost on the same claim in an earlier suit. On May 3, 1971, this Court decided **Blonder-Tongue Laboratories, Inc. vs University of Illinois Foundation, et al** (No. 388-October Term 1970). In discussing collateral estoppel, Mr. Justice White in speaking for the majority said:

> "**** Also, the authorities have been more willing to permit a defendant in a second suit to invoke an estoppel against a plaintiff who lost on the same claim in an earlier suit than they have been to allow a plaintiff in the second suit to use offensively a judgment obtained by a different plaintiff in a prior suit against the same defendant. ***"

For other reasons as well, the attempted offensive use of the previous Securities and Exchange Commission equitable suit to determine Petitioner's current action at law works a great hardship on Respondents and places an unjust and extraordinary burden upon them. In **Mutual Shares Corporation vs Genesco, Inc.** 384 F. 2d 540 (2nd Cir. 1967) at page 547 the court observed that a claim for injunctive relief largely avoids the issues of proof of loss and causal connection with the alleged violation of the law. That court quotes with approval from an opinion of this Court in **Securities and Exchange Commission vs Capital Gains Research Bureau, Inc.** 375 U. S. 180 (1963) at page 193 where it was said that "It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages." The Petitioners, who

have a heavier burden of proof in this suit than did the Securities and Exchange Commission in the prior suit, were permitted by the trial court to completely prove their entire cause of action for damages and remedies at law by relation back to the previous case wherein the burden of proof was lighter and on this basis they now claim estoppel as their sole grounds for relief.

The considerations of fairness relied upon by the Court below dictate and require that Respondents be allowed their day in court on the highly disputed issues of fact in this case.

TRIAL BY JURY

In **Ross vs Bernhard** 396 U. S. 531 (1970), it was declared that the Seventh Amendment preserves the right to trial by jury in suits at common law and not merely suits which the common law recognized, but suits in which legal rights were to be ascertained and determined in contra-distinction to those where equitable rights alone were recognized. In that same case, it was declared that while derivative actions are equitable in nature, rights to trial by jury attached to those issues as to which the corporaion, if it had been suing in its own right, would have been entitled to a jury trial. (pages 532-533.)

This suit is purely an action for legal damages based upon an alleged violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Suits brought pursuant to these Acts have been classified as ones

"at law." **Fischman vs Raytheon Mfg. Co.** 188 F. 2d 783 (2nd Cir. 1951). That these statutory and rule making provisions provide a basis for civil action for damages in spite of the absence of express authorization to that effect, has been declared in **Kardon vs National Gypsum Co.,** 69 F. Supp. 512 (E. D. Pa. 1946). **McClure vs Borne Chemical Company,** 292 F. 2d 824 (3rd Cir. 1961) at 836 observes that the basis of the landmark **Kardon** doctrine was the common law tort rule that a private right of action may be implied from a statute in favor of those whose interest the statute was designed to protect. "It is a venerable common law doctrine that a person injured by violation of a statute enacted for the benefit of persons in his position is entitled to recover his damage." A. Bromberg, **Securities Laws: Fraud - - SEC Rule 10b-5,** Sec. 2.4(1) (a) p. 29; See also **Restatement of Law of Torts 2d,** Section 286. Besides being a common law action of the nature of a tort and recognized at common law, thereby insuring the right of trial by jury, the claim is purely a legal one since the relief sought is money damages. Under the holding of **Ross vs Bernhard,** 396 U. S. 531 (1970), this reason alone entitles one to trial by jury. See also **Richland vs Crandall,** 259 F. Supp. 274 (S. D. N. Y. 1966). For a case in which jury trial was afforded in a civil suit involving matters arising under the Securities Exchange Act of 1934, see **Myzel vs Fields,** 386 F. 2d 718 (8th Cir. 1967) Cert. denied 390 U. S. 951.

Due to the nature of this suit, and the relief sought, there is no basis for denying Respondents the right of trial by jury on the causes of action asserted against

them by Petitioners. Especially is this conclusion a correct one in the light of the announced purpose of this Court "**** to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed.***" **Schoenthal vs Irving Trust Company** 287 U. S. 92 (1932) at Page 94.

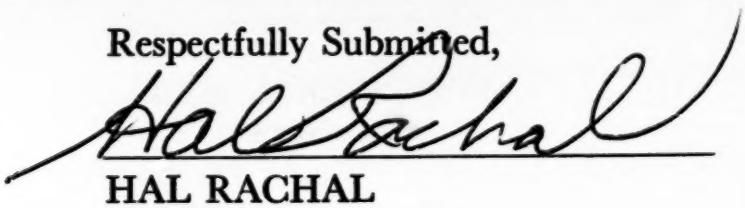
GENUINE ISSUES OF MATERIAL FACT

The Court below observed that the trial court failed to find that there were no genuine issues of material fact but instead entered findings of fact and conclusion of law in this summary judgment proceeding. As emphatically emphasized by the affidavit filed by Respondents, issues of fact were highly disputed when this case was presented to the trial court. (Appendix in court below page 54) On this basis, a summary judgment was improper. The trial court's own failure to find that there were no genuine issues of material fact as required by Rule 56c emphasizes by itself the inappropriate nature of a summary judgment in this proceeding.

CONCLUSION

The Court of Appeals properly remanded this case for a trial on the merits. Such a result will afford Petitioners every opportunity to present their claims without impairing or restricting Respondents in their right to a full and fair determination of the disputed issues by a jury. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be dismissed or denied.

Respectfully Submitted,



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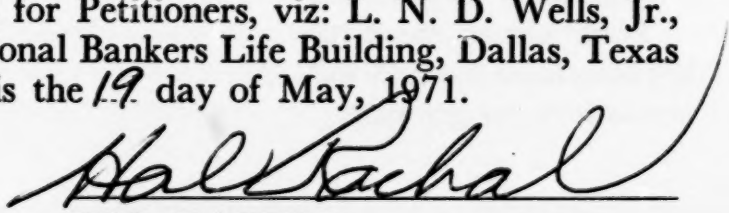
CERTIFICATE OF SERVICE

I certify that three copies of the foregoing were deposited in the United States Mail at Midland, Texas, in a properly stamped envelope addressed to counsel for Petitioners, viz: L. N. D. Wells, Jr., 1601 National Bankers Life Building, Dallas, Texas 75201, this the 19 day of May, 1971.



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